IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRENCE MARCHE'	**:**	
	:	**CIVIL ACTION**
v.	**:**	
	:	**No. 1998-CV-4219**
JOSEPH PARRACHAK,[1] et al.	**:**	

M E M O R A N D U M

I. Introduction

Plaintiff Terrence Marche robbed a bank at gunpoint on August 22, 1996. During the course of that robbery, he sustained two gunshot wounds when a police officer intervened. Plaintiff now seeks $25,000,000 in damages from defendants Officer Joseph Paraschak and the City of Philadelphia. This court granted summary judgment to both defendants on September 12, 2000, and now amplifies on that decision pursuant to Third Circuit Appellate Rule 3.1.[2]

While I view the evidence in a light most favorable to Marche on this summary judgment motion, I am also mindful that Marche has pled guilty to armed bank robbery. In Marche's guilty plea colloquy, Assistant U.S. Attorney Robert Calo summarized the facts leading up to the bank robbery. The plea court asked Marche if he disputed or denied the operative facts behind the plea. As Marche stood by, his attorney answered, "No, no." Marche does not now, nor could he, deny his role in the bank robbery. See DiJoseph v. Vuotto, 968 F. Supp. 244, 247 (E.D. Pa.

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1. Officer Joseph Paraschak's name is misspelled in the complaint.

2. The Third Circuit Appellate Rule 3.1 provides:

> At the time of the filing of the notice of appeal, the appellant shall mail a copy thereof by ordinary mail to the trial judge. Within 15 days thereafter, the trial judge may file and mail to the parties a written opinion or a written amplification of a prior written or oral recorded ruling or opinion.

3d CIR. R. 3.1.

1997) (giving preclusive effect to operative facts underlying state court conviction in subsequent §1983 suit). See also Heck v. Humphrey, 512 U.S. 477 (1994) (disallowing use of §1983 litigation as collateral attack on state court conviction because facts underlying conviction retain preclusive effect until set aside on appeal, by executive order, or by grant of writ of habeas corpus). But see Nelson v. Jashurek, 109 F.3d 142 (3d Cir. 1997) (holding that existence of conviction for nonviolent crime will not preclude finding that arrest effectuated with excessive force). Therefore, I take as true the operative facts underlying the plea, and view other contested facts in a light favorable to Marche.

II. Factual History

Approximately one week before the robbery, Terrence Marche approached Nathaniel Pasco and proposed robbing a bank. Marche and Pasco recruited two other individuals – Eric Lawson and a person known only as "Fat" – to aid them. The four met on August 21, 1997, the day before the robbery. Marche, Lawson, and Fat agreed to procure some weapons. Later that evening, Marche stole a vehicle from Northeast Philadelphia and parked it near the Prime Bank on 8500 Germantown Avenue, in the Chestnut Hill section of Philadelphia.

The four met again on the morning of August 22, 1997, and Marche and Pasco were given guns and masks. The group entered Lawson's car and drove to the location where Marche had parked the stolen car. Marche, Pasco, and Fat got into the stolen car and proceeded to the bank. When they arrived, Marche and Pasco exited the car while Fat remained behind the wheel.

In the meantime, Philadelphia Police Officers Joseph Paraschak and Stephen O'Donnell were on bicycle patrol in the area. The officers entered on the south side of the bank to sign the

bank log. Both officers wore bicycle patrol outfits, with the word "POLICE" emblazoned across their backs. Officer O'Donnell went to sign the bank log near the teller area while Officer Paraschak sat in a chair directly near the entrance. He remained seated there for approximately five minutes. Officer O'Donnell stood near the teller area in the center of the bank. Several other people were in the bank, including tellers, bank patrons, and some small children.

At precisely 10:09:14 a.m., Marche and Pasco burst into the bank wearing masks and carrying weapons. Marche wore a light colored sweatshirt and Pasco was dressed in dark clothing. Marche, with his .44 caliber pistol drawn, ordered everyone to get on the floor. Officer O'Donnell and several patrons lay down on the floor and remained there throughout the robbery. The surveillance video shows that Pasco remained in the center of the bank, holding a TEC-9 machine pistol. He walked up to the teller booths and stole $180 from the counter.

Officer Paraschak, who had been sitting near the entrance, stood and attempted to draw his weapon.[3] Marche turned and said, "DON'T DO IT."[4] Officer Paraschak then dove to the floor and shot at Marche, hitting him in the left side of his chest. Officer Paraschak, for his part, did not know if he had hit Marche. Marche then fell on the police officer and the two began to struggle. Marche then shot at Paraschak.[5] The bullet struck Paraschak's bicycle helmet, knocking it off the officer's head.

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3. The video alternates between displays of the main teller area and a view of the vault. Unfortunately, the struggle between Marche and Officer Paraschak happened off camera.

4. Marche claims he did not recognize Officer Paraschak as a member of the police, despite the police bicycles out front and the identical uniforms with "POLICE" worn by the two officers written across the back.

5. Officer Paraschak maintains that Marche fired first. However, at this stage, the court resolves all factual disputes in Marche's favor.

The two then fought hand to hand, making their way to the northern section of the bank. They crashed through an office door, and the struggle continued. Marche eventually landed on the floor with Officer Paraschak on top of him.

Here, the accounts of Marche and Officer Paraschak differ. According to Marche, he dropped his weapon and offered to give up.[6] With his hand now free, Officer Paraschak aimed his weapon at the defendant and fired again, this time striking him in the left eye socket. Officer Paraschak claims he only fired after seeing Pasco point a weapon at him.

Marche claims he called out to Pasco for assistance. Then, he claims, he threw Paraschak off from on top of him. Marche and Pasco ran toward the exit with Officer Paraschak in pursuit. Paraschak used a blunt object to strike at Marche. Marche and Pasco escaped through the main bank entrance to a waiting car driven by Fat. The entire incident took less than 60 seconds.

The guilty plea colloquy reflects that Marche and his three co-conspirators joined Lawson, and then went to a house owned by a friend of Pasco. Pasco and his friend then drove Marche to Cooper Medical Center in Camden, New Jersey to seek treatment for his wounds. Marche fell into a coma. When he awoke, FBI investigators gave him Miranda warnings and took his statement detailing the robbery and the events leading up to it.

Marche subsequently pled guilty to one count of conspiracy under 18 U.S.C. §371, one count of armed bank robbery under 18 U.S.C. §2113(d), and one count of using firearms in relation to a crime of violence under 18 U.S.C. §924(c). At his guilty plea colloquy, counsel for

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6. In his complaint, Marche alleges that he posed little danger to Officer Paraschak because he was "semi-conscious" at this time. This is belied by the fact the surveillance video clearly shows that he fled from the bank under his without assistance and without any noticeable disability.

Marche stated that additional testimony as to the shooting would be introduced at sentencing. However, no evidence favoring Marche's present claim followed at his sentencing hearing. Instead, his attorney stated "I'm not trying to shift blame for why or how [Marche] got shot." Marche himself stated:

> I'd like to let you know I'm very remorseful for what I've done. And I made the mistake. Now I'll never make the mistake again. And I'm sorry for traumatizing anyone, for causing any harm to the police officer or anyone who was there in the bank.

Sentencing Hearing at 29 (emphasis added).

Marche had, a total of, three opportunities to put forth his version of events prior to the initiation of the current action: in his confession, at his guilty plea colloquy, and at his sentencing hearing. Marche told the current version of his story in none of them. He never claimed he surrendered before he was shot in the face.

Marche filed a civil action on August 12, 1998, for the first time alleging that he had attempted to surrender before being shot a second time. After ample time for discovery, defendants Paraschak and the City of Philadelphia moved for summary judgment, which I granted on September 12, 2000.

III. Discussion

A. Standard for Summary Judgment

A motion for summary judgment shall be granted where all of the evidence demonstrates that "there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law." FED. R. CIV. P. 56(c). The entry of summary judgment is mandatory when, after adequate time for discovery, a party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). It is insufficient for an opposing party to rest on his pleadings as "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56 advisory committee's note to subsection (e), 1963 Amendment. A genuine issue exists only if a reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In addition, there must be some evidence on which a jury could reasonably find for the non-movant. See id. at 252. Only disputes over facts which would affect the outcome of the suit will preclude summary judgment. See id. at 248. A court must accept the non-movant's allegations as true and view the evidence in the light most favorable to the non-movant, see Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995).

B. Excessive force claims under §1983

Plaintiff Marche brings suit pursuant to §1983.[7] The §1983 plaintiff has the burden to prove that a person has violated his constitutional or federal rights under color of law. See Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). Section 1983 only

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7. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

provides remedies for existing constitutional or federal rights; it creates no substantive rights of its own. See Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996). A party seeking to invoke the remedy afforded by §1983 must point to some provision of federal or constitutional law which provides substantive protection. See id.

Claims of excessive force by police officers while making an arrest are now governed by the Fourth Amendment's requirement of reasonable seizures.[8] See Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985). In Garner, Justice White wrote for the court, "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Id. at 7. Deadly force may be justified, but only to prevent escape when the suspect would pose "a significant threat of death or serious physical injury to the officer or others." Id. at 3. The Supreme Court recognized an armed felony may require a greater amount of forceful intervention by law enforcement. See id. at 21. While the Garner Court disapproved of the shooting of an unarmed child committing a burglary, it circumscribed its holding. See id. The court noted that the suspect was unarmed and too small to pose a threat to the police. See id. The court remarked, "[T]he armed burglar would present a different situation." Id.

In Graham v. Connor, the Supreme Court elucidated the standards by which all pretrial seizures would be governed under the Fourth Amendment's requirement of reasonableness. See Graham, 490 U.S. at 394-95. The objective reasonableness of the officer's decision to use force should be gauged under the totality of circumstances. See id., 490 U.S. at 394. A court should

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8. The Fourth Amendment affords a "right of the people to be secure in their persons... against unreasonable... seizures." U.S. CONST. AMEND. 4 (emphasis added).

pay careful attention to the facts and circumstances of each case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest. See id., 490 U.S. at 394; Abraham v. Raso, 183 F.3d 279, 289 (3d Cir. 1999). The test is objective; an officer's subjective intent or motivation is irrelevant. See Graham, 490 U.S. at 396. A police officer making an arrest may use a reasonable amount of force if necessary to effectuate a lawful arrest. See id., 490 U.S. at 396. An officer may use deadly force to prevent escape where the suspect presents a significant threat of death or serious physical injury to the officer or others. See Abraham, 183 F.3d at 289. A court must also be mindful that police officers in the line of duty are often called upon to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving. See Graham, 490 U.S. at 396.

The Third Circuit has added that it is also appropriate to examine the events leading up to and including the actual use of force in evaluating the "totality of circumstances." Abraham, 183 at 291-92 (3d Cir.1999). Thus, in reviewing the facts in the instant case, a court is not limited to the moment just before the shooting. See id. Rather, the court must assess the danger to the officer and to others giving attention to specific and concrete circumstances which could affect an officer's judgment. See id. at 290. As for the decision to use force itself, the Third Circuit has recognized that "[d]etatched reflection cannot be demanded in the presence of an uplifted knife." Id. at 289, quoting Brown v. U.S., 256 U.S. 335, 343 (1921).

While a jury has an important role to play in evaluating the degree of reasonableness of an officer's use of force, defendants can still prevail on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of

force was objectively reasonable under the circumstances. See Abraham v. Raso, 183 F.3d 279, 290 (3d Cir. 1999) (quoting Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)); Sharrar v. Felsing, 128 F.3d 810 (3d Cir. 1997) (affirming summary judgment where no evidence supported finding of excessive force); Hopkins v. Andaya, 958 F.2d 881, 885 (9th Cir. 1992) ("[O]n summary judgment, the court may make a determination as to reasonableness where, viewing the evidence in the light most favorable to [the §1983 plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable.").

The Third Circuit has reversed summary judgment only when a genuine issue existed as to the level of force necessary to prevent the suspect from inflicting harm on the officer or others. See e.g. Abraham v. Raso, 183 F.3d 279 (3d. Cir. 1999) (finding issue as to whether police officer could have avoided danger to self without force and whether suspect posed any danger to others); Groman v. Township of Manalapan, 47 F.3d 628 (3d Cir. 1995) (dispute as to whether suspect hit officers necessitating use of force).

C. No genuine issue exists as to the level of force used against Marche

As the plaintiff in a §1983 action, Marche has the burden to prove a violation of a civil right secured by the Constitution or federal law and must show that the alleged deprivation was committed by a person acting under color of state law. See Groman, 47 F.3d 628, 633 (3d Cir. 1995). The application of deadly force is a seizure for the purposes of the Fourth Amendment. See Tennessee v. Garner, 471 U.S. 1, 7 (1985). There can be no question that the instant Marche was shot, he was 'seized' within the meaning of the Fourth Amendment. However, only unreasonable seizures – those made with an excessive amount of force – violate the constitution.

Id. Upon a review of the record for evidence indicating that excessive force may have been used, I find no genuine issue of material fact. See FED. R. CIV. P. 56(c).

1. Plaintiff's record fails to establish that excessive force was used

Marche must point to some evidence beyond mere allegations in his complaint in order to proceed to trial. FED. R. CIV. P. 56 advisory committee's note to subsection (e), 1963 Amendment. In support of his brief in opposition to summary judgment, Marche appended only a signed statement which he wrote, an excerpt from an appellate brief filed on his behalf, interrogatories and answers by the defendants, and a statement made by Officer Paraschak to the Internal Affairs Division of the Philadelphia Police Department.

First, the excerpt from the brief – a self serving recitation of facts written in an advocate's course of duty – does not qualify as a pleading, deposition, answer to interrogatories, admission on file, or affidavit which may be considered on summary judgment. FED. R. CIV. P. 56(c). Plaintiff's other exhibits are also unavailing. The answers to interrogatories add little more information. Officer Paraschak's statement gives his version of events.

In the end, Marche has only produced his own statement as to what occurred. This court cannot give any credence to Marche's latest story. He has, on three previous occasions, had the opportunity to retell the events surrounding the bank robbery – in his initial statement to the FBI, during his guilty plea colloquy, and at his sentencing hearing. In none did he allege that Officer Paraschak shot him after he surrendered. In fact, he confessed to the fact that he held up a bank at gunpoint. Marche's guilty plea colloquy makes clear that Marche pointed his gun at Paraschak and ordered the officer to abandon his weapon just fractions of a second before the first shot. Marche admits, in his colloquy and in his complaint, that he shot at Officer Paraschak. Marche even apologized for any harm he did to Paraschak. In sum, Marche stretches credulity to the

point of chutzpah[9] in proceeding with his claim. On this ground alone, the court is justified in withholding this case from a jury. See Brown v. Borough of Chambersburg, 903 F.2d 274 (3d Cir. 1990) (affirming directed verdict where only plaintiff's version of events supported his excessive force claim and all other evidence supported defendants' version).

However, even if I accepted Marche's version of events as true, there still would be no genuine issue of material fact. Undoubtedly, there was "a significant threat of death or serious physical injury to the officer or others," Tennessee v. Garner, 471 U.S. 1, 3 (1985). Both shots fired by Officer Paraschak were justified to protect himself, his partner lying on the floor, bank employees and patrons, and the children.

When Officer Paraschak fired his first shot, two masked men armed with guns had just run into the bank. His fellow officer had been ordered down on the ground and his weapon taken. The officer found himself confronting two armed felons without any immediate backup. As he was drawing his revolver, plaintiff turned, pointed his gun at Officer Paraschak and said, "DON'T DO IT."[10] While Marche may not have intended to fire, Officer Paraschak still confronted the barrel of a loaded a gun. With only a split second to act, Paraschak dove to the ground, aimed his weapon at Marche, and pulled the trigger.

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9. The term chutzpah has entered the legal vernacular of even the U.S. Supreme Court. See Nat'l Endowment for the Arts v. Finley, – U.S. –, 118 S. Ct. 2168, 2186 (1998) (Scalia, J. concurring). See also Jack Achiezer Guggenheim, Essay, *The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court*, 87 KY. L. J. 417 (1998).

10. Marche, in his brief, makes much of the fact that he did not know that the individual drawing the weapon was a police officer. Even assuming that to be true, it gives the court cold comfort. Civilians and un-uniformed police officers are not fair game simply because they attempt to thwart a crime. Marche was not justified in his conduct to anyone, whether in civilian or service clothing.

The second shot which hit Marche was also justified. Officer Paraschak's uncontradicted statement clearly says that he did not know whether Marche had actually been hit. In any event, Marche still had enough strength to wrestle with Paraschak. After they crashed through a door, the officer found himself temporarily on top. At this point, Marche claims he let go of his gun and stopped struggling. Nonetheless, the record reflects that Officer Paraschak had already been shot at, and was involved in a physical struggle with the plaintiff. Marche's accomplice, armed with a TEC-9 in the video, was headed towards the back office. Marche's gun could have been no more than feet – perhaps inches – away. Finding a momentary advantage, the Officer fired.

Marche's claim that his "near death" or "semiconscious" condition neutralized any danger to the officer is also negated by the record. By his own admission, he had the strength to struggle with Officer Paraschak and to push the officer off of him at the end of the struggle. The surveillance video clearly shows Marche fleeing the bank under his own power.

Finally, Graham cautions courts to consider that law enforcement officers often make split second decisions under tense, rapidly evolving circumstances. See Graham v. Connor, 490 U.S. 386, 396 (1989). This entire incident took less than a minute. Officer Paraschak had to make a series of split second decisions, some with a loaded gun pointed at him. Officer Paraschak was actually fired upon. Fortunately, the bullet hit his helmet and not anything more vital.

In sum, the three factors mentioned in Garner – the severity of the crime, the threat posed by the suspect, and active resistance to arrest – all favor Officer Paraschak's decision to use deadly force. See Garner, 471 U.S. at 3. The crime here to which plaintiff pled guilty – armed bank robbery – is particularly severe and fraught with danger for victims. Plaintiff posed

an immediate threat to Officer Paraschak and others in the bank. Plaintiff was actively resisting arrest. Therefore, while viewing the evidence in the light most favorable to the plaintiff, the totality of the circumstances requires a conclusion that Officer Paraschak's conduct was objectively reasonable.

2. Qualified immunity

Officer Paraschak may prevail on summary judgment on qualified immunity grounds as well. Qualified immunity protects government officials performing discretionary functions from civil liability, provided that their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). As the First Circuit stated, "[T]he Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases." See Roy v. Inhabitants of City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994).

Qualified immunity claims should be resolved before trial when possible. See Hunter v. Bryant, 502 U.S. 224 (1991). Whether a government official is entitled to summary judgment is a purely legal question. See Rogers v. Powell, 120 F.3d 446 (3d Cir. 1997); Anciero v. Cloutier, 40 F.3d 597 (3d Cir. 1994). The judge may determine currently applicable law and whether it was clearly established. See id. Turning qualified immunity into a purely legal issue avoids excessive disruptions of government and permits the resolution of insubstantial claims on summary judgment. See id.

In the instant case, this court has already concluded that the officer's use of force was justified under currently applicable law. In addition, this court has found no precedent barring

the use of deadly force in the midst of an armed bank robbery where the plaintiff has manifested a willingness and ability to fire on law enforcement officials. To the contrary, a statement by the Supreme Court indicates that it is precisely when perpetrators of felonies are armed that deadly force is appropriate. See Tennessee v. Garner, 471 U.S. 1, 21 (1985). Therefore, I conclude that Officer Paraschak violated no clearly established law when he fired upon Marche.

3. The City of Philadelphia cannot be held liable

As Marche suffered no violation of his constitutional rights, the city cannot be held liable. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (ruling no liability on part of city where jury found no constitutional violation had occurred).

I also note that plaintiff has adduced no evidence of any custom or policy on the part of the City of Philadelphia which authorized or encouraged Officer Paraschak's conduct in the instant case. See Monell v. Dep't of Soc. Services of the City if New York, 436 U.S. 658 (1978). Marche also has not alleged or offered any proof of Philadelphia's failure to train officers or its deliberate indifference to suspects' civil rights. See City of Canton v. Harris, 489 U.S. 378 (1989).

IV. Conclusion

In light of the reasoning above, this court entered summary judgment in favor of defendants City of Philadelphia and Officer Paraschak on plaintiff's sole count of excessive force.

BY THE COURT:

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Berle M. Schiller, J.